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Patricia A. Cain

Santa Clara University School of Law, pcain@scu.edu

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13 J. Gender Race & Just. 27

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Contextualizing *Varnum v. Brien*: A “Moment” in History

Patricia A. Cain*

I. INTRODUCTION

*Varnum v. Brien*¹ is the last case in a line of state constitutional law challenges in what has been a fifteen-year campaign by LGBT² public interest lawyers seeking legal recognition for same-sex couples. While the litigation may be over for now,³ the larger battle is just beginning. The Iowa Supreme Court’s ruling in *Varnum* will play a central role in this future battle. It stands as part of a major “moment” in the modern history of recognizing equal marriage rights for same-sex couples. By “moment,” I do not mean a single point in time, but a prolonged period of a year or so over which a substantial shift occurs.

I see three key moments in this modern battle for marriage equality. The first distinct moment is the period of time in 1996 surrounding the Hawaii litigation⁴ and the incipient backlash evidenced by the enactment of various “Defense of Marriage” laws, both at the federal and state level. The second moment occurred in 2003–2004. In that period of time, marriages for lesbian and gay partners became available in Massachusetts,⁵ and a handful of mayors around the country (as well as some county commissioners)

* Inez Mabie Distinguished Professor of Law, Santa Clara University.

1. *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

2. LGBT is often used as an abbreviation for “Lesbian, Gay, Bisexual, and Transgender.” LGBT public interest lawyers include lawyers at organizations like Lambda Legal Defense and Education Fund, Inc. (Lambda), the National Center for Lesbian Rights (NCLR), Gay and Lesbian Advocates and Defenders (GLAD), and the LGBT and AIDS Project of the American Civil Liberties Union (ACLU).

3. While the LGBT groups are not currently pursuing marriage litigation in other states, private attorneys Ted Olson and David Boies have filed suit in federal court in California, challenging California’s constitutional provision on marriage on federal constitutional grounds. *See* Complaint for Declaratory, Injunctive, or Other Relief, *Perry v. Schwarzenegger*, No. 09-2292 (N.D. Cal. May 22, 2009). *See generally* American Foundation for Equal Rights, <http://www.equalrightsfoundation.org/press.html> (last visited Oct. 22, 2009).

4. *See Baehr v. Lewin*, 852 P.2d 44 (Haw. 1993).

5. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003) (holding that marriage licenses for same-sex couples should be made available in May of 2004).

authorized the issuance of marriage licenses to same-sex couples.⁶ As a result, the national news media piped footage of the marriage ceremonies of same-sex couples into American households. Many people saw the face of the LGBT community and found it different from the images on prior television coverage of LGBT events. The third moment occurred in 2008–2009, when legal marriages between same-sex partners became available outside of Massachusetts. The Iowa case is part of this third moment and, in my view, has played a pivotal role in determining the future. This article will provide additional texture for these three “moments” and explain briefly where this current moment is likely to lead.

II. BACKGROUND: EARLY HISTORY OF MARRIAGE LITIGATION IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT

In the early days of gay liberation, following the Stonewall Riots in June of 1969,⁷ marriage was not high on the list of most lesbian and gay rights activists. The women’s movement had battled to diminish the importance of marriage, arguing that women should be judged on their abilities as individuals and not in their roles as wife and mother.⁸ Radical feminists denounced the institution of marriage as a patriarchal bond from which women should free themselves.⁹ Gay liberation activists took similar positions in the early 1970s, typically calling for the abolition of marriage altogether,¹⁰ which would not only undo the harms to women and men trapped by the gendered roles that marriage had supported, but would also produce a certain measure of equality for everyone.

Nonetheless, individual gay and lesbian couples, heartened by the

6. For more details about these events, see Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J. C.R. & C.L. 1, 4 (2007).

7. Some LGBT activists cite the famous Stonewall Riots as the beginning of the modern LGBT equality movement. On June 28, 1969, at around 1:00 a.m., the Stonewall Inn, a gay bar in New York City, was raided by the police. Rather than quietly accepting their fate, the patrons and supporters in the streets fought back. This moment of resistance certainly fueled a national movement. But, to be correct about history, the modern LGBT movement actually had begun earlier in California with the formation of the Mattachine Society and Daughters of Bilitis by California activists. See generally PATRICIA A. CAIN, *RAINBOW RIGHTS: THE ROLE OF LAWYERS AND COURTS IN THE LESBIAN AND GAY CIVIL RIGHTS MOVEMENT* 53–56 (2000) [hereinafter *RAINBOW RIGHTS*]. For an interesting history of the Stonewall Riots, see generally MARTIN DUBERMAN, *STONEWALL* (1993).

8. Many of the key feminist critiques are cited in WILLIAM N. ESKRIDGE, JR., *THE CASE FOR SAME-SEX MARRIAGE: FROM SEXUAL LIBERTY TO CIVILIZED COMMITMENT* 231 n.9 (1996).

9. *Id.*

10. See, e.g., Tim Mayhew, ACLU of Washington, Position Statement on Marriage (December 5, 1971) (on file with Tim Mayhew Collection on Gay Rights, Box 12, University of Washington Libraries, Manuscripts & University Archives Division) (calling for total abolition of marriage).

political activism for gay equality that followed Stonewall, challenged marriage laws in several states. Four such challenges produced reported decisions.¹¹ Plaintiffs relied primarily on equality and due process arguments, arguing that the statutes discriminated on the basis of sex and deprived the plaintiffs of the fundamental right of privacy, or more specifically, the right to marry.¹² Similar arguments had succeeded before the United States Supreme Court in *Loving v. Virginia*, the case that struck down Virginia’s ban on interracial marriages.¹³ To many, it seemed a logical step to argue that if a state could not restrict the race of one’s chosen spouse, it similarly could not restrict the gender.¹⁴ The courts hearing these arguments, however, thought otherwise, concluding, in the words of the Supreme Court of Kentucky, that “no constitutional issue is involved.”¹⁵

The first reported case, *Baker v. Nelson*, was litigated in Minnesota.¹⁶ The plaintiffs, Jack Baker and Mike McConnell, argued that the Minnesota marriage statute, which provided that “marriage . . . is a civil contract, to which the consent of the parties, capable in law of contracting, is essential,”¹⁷ did not by its terms restrict marriage to a man and a woman.¹⁸ Further, they argued, if it did, the restriction violated the Federal Constitution.¹⁹ The Minnesota Supreme Court ruled that society had always understood marriage, as used in the Minnesota statute, as a contract limited to a man and a woman and refused to construe the statute more broadly.²⁰ It also rejected the federal constitutional claims, distinguishing *Loving* as a decision based on patent racial discrimination and finding no analogy

11. The four cases are: *Baker v. Nelson*, 191 N.W.2d 185 (Minn. 1971), *appeal dismissed*, 409 U.S. 810 (1972); *Jones v. Hallohan*, 501 S.W.2d 588 (Ky. Ct. App. 1973); *Singer v. Hara*, 522 P.2d 1187 (Wash. Ct. App. 1974), *review denied*, 84 Wash. 2d 1008 (Wash. 1974); and *Burkett v. Zablocki*, 54 F.R.D. 626 (E.D. Wis. 1972). *See also* *Adams v. Howerton*, 673 F.2d 1036 (9th Cir. 1982) (holding that, although male couple obtained marriage license from county clerk in Boulder, Colorado, and minister “married” the couple, the marriage was not recognized by federal immigration law, and thus alien “spouse” was not allowed to stay in the country).

12. *See Baker*, 191 N.W.2d at 185.

13. *Loving v. Virginia*, 388 U.S. 1 (1967).

14. *See Jones*, 501 S.W.2d at 589.

15. *Id.* at 590.

16. *Baker*, 191 N.W.2d at 185.

17. MINN. STAT. § 517.01 (1976) (subsequently amended in 1977 to provide that the contract must be between a man and a woman).

18. *Baker*, 191 N.W.2d at 186.

19. *Id.*

20. *Id.*

between race and sex restrictions in marriage statutes.²¹ As to their privacy/right to marry argument, the court ruled that under *Griswold v. Connecticut*,²² privacy rights were limited to married couples.²³ Baker and McConnell appealed the decision to the United States Supreme Court.²⁴

At that time, appellate review procedures required the United States Supreme Court to grant review in any case appealed from the highest state court if that court had rejected the federal claims.²⁵ The U.S. Supreme Court denied the requested review in *Baker*, holding that the case did not raise a “substantial federal question.”²⁶ Technically, that holding became binding precedent on lower federal courts.²⁷ Thus, as early as 1972, the United States Supreme Court had, in effect, ruled that the Federal Constitution did not provide protection for same-sex couples who might wish to marry.

As a result of these 1970s marriage cases, a number of states revised their marriage statutes. Many states, like Minnesota, did not have an explicit statutory provision limiting marriage to a man and a woman. Indeed, many states removed gender-specific terms for their marriage statutes by the early 1970s in response to 1960s feminist demands. For example, some state legislatures replaced the words “man” and “woman” with the word “person” in their statutes.²⁸ In 1973, Maryland became the first state to clarify its gender-neutral marriage statute through an amendment providing that “[o]nly a marriage between a man and a woman is valid in this State.”²⁹ And, in Minnesota, even though the state supreme court had construed the

21. *Id.* at 187.

22. *Griswold v. Connecticut*, 381 U.S. 479 (1965) (invalidating state law that restricted a married couple’s use of birth control; holding that the law violated a married couple’s right to privacy).

23. *Baker*, 191 N.W.2d at 186–87.

24. *Baker v. Nelson*, 409 U.S. 810 (1972).

25. See 28 U.S.C. § 1257, *repealed by* Pub. L. No. 100-352, 102 Stat. 662 (1988). Before repeal, the section provided that a case was appealable as of right from a state court if it involved the validity of a state statute contested under some federal provision and the state court upheld the statute.

26. *Baker*, 409 U.S. at 810.

27. See *Hicks v. Miranda*, 422 U.S. 332, 343–44 (1975).

28. California offers a good example of this phenomenon. The marriage statutes in that state used to require males to be twenty-one before they could marry, whereas females could marry at age eighteen. When the legislature equalized the two sexes, it changed the statute to provide that the age of capacity to consent to marriage would be eighteen for any “unmarried person.” See CAL. CIV. CODE § 4101 (West 1977), *amended by* CAL. CIV. CODE § 4101 (West 1983). For a full discussion of the legislative history of these changes in California, see *In re Marriage Cases*, 183 P.3d 384, 409 (Cal. 2008).

29. MD. CODE ANN., FAM. LAW § 2-201 (West 1984).

statute to include such a restriction, the state legislature amended the statute in 1977 to make that restriction explicit.³⁰

By 1978, the push for marriage licenses by same-sex couples appeared to have run its course, at least for that era. But attention to the issue arose once again a decade later when the American Civil Liberties Union (ACLU), and then the Bar Association of San Francisco, went on record as endorsing the right of same-sex couples to marry.³¹ Same-sex couples again began applying for marriage licenses, and gay rights litigators at public interest law firms like Lambda Legal Defense and Education Fund (Lambda) and the ACLU began debating whether they should add same-sex marriage cases to their dockets.³²

Portions of the LGBT community strongly resisted committing resources to a battle for marriage equality in the courts. Other issues, such as employment discrimination and hate crimes, seemed more central to the immediate needs of the community. In addition, the ability to win a marriage case (especially at the federal level) seemed too remote a possibility to warrant its pursuit. Tom Stoddard, then Executive Director of Lambda, recommended that litigants should file any future gay marriage cases in state courts under state constitutional claims.³³

As a matter of litigation strategy, the turn to state courts was absolutely necessary. *Baker v. Nelson* was on the books. Lower federal courts could cite the U.S. Supreme Court’s dismissal of the appeal in that case as negative precedent.³⁴ Furthermore, the fundamental rights and equal protection arguments that litigants had pressed since *Baker* were not meeting with much success in other gay rights cases litigated in federal courts.³⁵ In 1986,

30. MINN. STAT. ANN. § 517.01 (West 2006). California similarly amended its marriage statute in 1977 to provide that marriage was a relationship between a man and a woman. See CAL. CIV. CODE § 4100 (West 2006). The legislature repealed this section in 1993 and replaced it with CAL. FAM. CODE § 300 (West 2006). The California Supreme Court held it unconstitutional in *In re Marriage Cases*, 183 P.3d 384, 452 (Cal. 2008).

31. The ACLU board statement of support came in 1986, and the San Francisco Bar statement followed in 1989. See *Rights Group Backs Homosexual Marriages*, N.Y. TIMES, Oct. 28, 1986, at A20; Harriet Chiang, ‘Significant Step’ Legal Group Backs Same-Sex Marriage, S.F. CHRON., Feb. 24, 1989, at A6.

32. See RAINBOW RIGHTS, *supra* note 7, at 257.

33. See, e.g., Thomas B. Stoddard, *Lesbian and Gay Rights Litigation Before a Hostile Federal Judiciary: Extracting Benefit from Peril*, 27 HARV. C.R.-C.L. L. REV. 555 (1992) (explaining the problem with litigating in federal court, but also recognizing that educational benefits might be obtained even in losing cases).

34. A challenge to DOMA in federal court in Florida resulted in a court opinion citing *Baker v. Nelson* as binding precedent under the federal constitution. See *Wilson v. Ake*, 354 F. Supp. 2d 1298, 1305 (M.D. Fla. 2005).

35. In the 1970s and early 1980s, First Amendment claims did produce success for some gay rights litigants, especially for gay student groups. See, e.g., *Gay Students Org. of the Univ. of N.H. v. Bonner*, 509 F.2d 652 (1st Cir. 1974).

when the Supreme Court handed down the horrific anti-gay opinion in *Bowers v. Hardwick*, it signaled that gay men and lesbians had no protected right of privacy under the federal constitution.³⁶ While *Bowers* had not raised an equal protection issue, the Court's ruling could be, and in fact was, cited for the principle that concern about public morality sufficiently justified discriminating against gay people.³⁷

The shift from federal courts to state courts as the more hospitable forum for gay rights claims occurred at the same time as a more general shift from federal to state forums in civil rights litigation. This shift began as the federal courts appeared to clamp down on rights claims, especially those pursued by criminals and prisoners.³⁸ State courts began construing their constitutions to provide broader protections.³⁹ After the loss in *Bowers v. Hardwick*, litigators began challenging sodomy statutes in state courts, claiming the statutes were unconstitutional because the statutes conflicted with state constitutional guarantees of privacy. Their first success came in 1990 when a lower court in Michigan struck down that state's sodomy statute under the privacy provisions of the Michigan constitution.⁴⁰

With respect to marriage litigation, challenges on state constitutional grounds could similarly be structured to rely on privacy provisions in state constitutions. But, in addition, many states had adopted an "equal rights amendment," specifically banning discrimination on the basis of sex and thereby offering another ground upon which to challenge marriage discrimination.⁴¹ By contrast, the Equal Rights Amendment (ERA), adopted by Congress on March 23, 1972,⁴² was never ratified by enough states to become part of the Federal Constitution.⁴³ One of the opponents' core

36. *Bowers v. Hardwick*, 478 U.S. 186 (1986) (upholding Georgia's sodomy statute as applied to a gay man who had engaged in consensual sex in the privacy of his bedroom and establishing that public morality was sufficiently justified).

37. See, e.g., *Padula v. Webster*, 822 F.2d 97 (D.C. Cir. 1987).

38. The Warren Court had expanded federal habeas review of state convictions. In the early 1970s, the Burger Court began to limit the availability of the writ of habeas corpus, preventing federal post-conviction review. A good discussion of this shift can be found at Robert M. Cover & T. Alexander Lienikoff, *Dialectical Federalism: Habeas Corpus and the Court*, 86 YALE L.J. 1035, 1069-72 (1977).

39. See generally William J. Brennan, Jr., *The Bill of Rights and the States: The Revival of State Constitutions as Guardians of Individual Rights*, 61 N.Y.U. L. REV. 535 (1986) (noting the Burger Court's narrowing of the scope of federal rights in the 1970s and a corresponding renewal of rights protection by state courts on state constitutional grounds).

40. *Mich. Org. for Human Rights v. Kelley*, No. 88-815820 CZ (Wayne County Cir. Ct. July 9, 1990).

41. See RAINBOW RIGHTS, *supra* note 7, at 161.

42. 118 CONG. REC. H2423 (daily ed. Mar. 23, 1972).

43. Ratification by thirty-eight states was required, and only thirty-five states ratified. See Orrin G. Hatch, *The Equal Rights Amendment Extension: A Critical Analysis*, 2 HARV. J.L. & PUB.

arguments against the ERA was that it would force states to recognize same-sex marriages.⁴⁴ The typical response by supporters was that the amendment was not intended to cause that result.⁴⁵

III. MOMENT NUMBER ONE: HAWAII AND DOMA

Hawaii was the first state to ratify the ERA and to adopt it as part of its state constitution.⁴⁶ Hawaii was also progressive regarding gay and lesbian rights. In April of 1991, it became the third state to enact statewide civil rights protections for gay men and lesbians.⁴⁷ One month later, three same-sex couples filed suit in the First Circuit Court in Honolulu, claiming that the State’s refusal to grant them a marriage license violated the equality provisions of the Hawaii Constitution and deprived them of the fundamental right to marry.⁴⁸ The circuit court dismissed the case on the pleadings.⁴⁹ Two years later, in May of 1993, the Hawaii Supreme Court shocked the entire country by ruling in favor of plaintiffs on their discrimination claim.⁵⁰ The fact that the court ruled in favor of the plaintiffs on the basis of sex discrimination contributed to the sense of shock. The parties did not even argue about sex discrimination; instead, they had viewed the restriction as sexual orientation discrimination.⁵¹ The court on its own steam adopted the sex discrimination rationale.⁵² The case was remanded to the trial court, which was instructed to apply strict scrutiny to the marriage statute.⁵³ The

POL’Y 19 (1979).

44. See *Singer v. Hara*, 522 P.2d 1187, 1191 n.5 (Wash. Ct. App. 1974).

45. *Id.*

46. See HAW. CONST. art. I, § 3 (adopted in 1972 as art. I, § 21 and then renumbered in 1978); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573, 583 n.46 (1973).

47. See HAW. REV. STAT. §§ 378-1 to -6. Wisconsin was the first state to enact such a law in 1982, followed by Massachusetts in 1989. See National Gay and Lesbian Task Force, *Years Passed Between Sexual Orientation and Gender Identity/Expression*, July 2007, http://www.thetaskforce.org/downloads/reports/fact_sheets/years_passed_gie_so_7_07.pdf. A full list of the states that currently have such laws and the dates of enactment can be found on the web page of the National Gay and Lesbian Task Force. See *id.*

48. They filed on May 1, 1991. See *Baehr v. Lewin*, 852 P.2d 44, 48–50 (Haw. 1993).

49. *Id.* at 52.

50. *Id.* at 52–68.

51. See *id.*

52. See Andrew Koppelman, *Why Discrimination Against Lesbians and Gay Men is Sex Discrimination*, 69 N.Y.U. L. REV. 197, 209 n.40 (1994).

53. *Baehr*, 852 P.2d at 68.

trial court could only uphold the marriage restriction if the government could show a compelling justification. Most observers of this legal battle assumed that, under strict scrutiny, the court would strike down the statute.⁵⁴

The Hawaii Supreme Court's actions raised concern among the people of Hawaii and infuriated the state legislature, which viewed the actions as an assault on legislative power.⁵⁵ In 1994, the legislature responded by amending the already specifically-gendered marriage statute to make it doubly clear that the legislature intended for marriage to be limited to one man and one woman.⁵⁶ It clarified its own view of the respective roles of the judiciary and the legislature in the following statement:

Legislative findings and purpose. The legislature finds that Hawaii's marriage licensing laws were originally and are presently intended to apply only to male-female couples, not same-sex couples. This determination is one of policy. Any change in these laws must come from either the legislature or a constitutional convention, not the judiciary. The Hawaii supreme court's recent plurality opinion in *Baehr v. Lewin*, 74 Haw. 530, 852 P.2d 44 (1993), effaces the recognized tradition of marriage in this State and, in so doing, impermissibly negates the constitutionally mandated role of the legislature as a co-equal, coordinate branch of government.⁵⁷

The national debate focused on questions regarding the appropriate function of judicial review in recognizing same-sex relationships. After the decision by the Hawaii Supreme Court, the argument that judges should not be entrusted with policy decisions regarding marriage became a rallying cry among opponents of same-sex marriage across the country. That cry reached its peak in 1996, both an election year and the year that the Honolulu Circuit Court was scheduled to hear the marriage case on remand.

In 1996, Congress and fifteen states passed statutes refusing to recognize same-sex marriage. The Federal Defense of Marriage Act (DOMA) provided that the federal government would not recognize same-

54. Statutes rarely survive strict scrutiny analysis. Gerald Gunther captured this reality in a phrase that is perhaps the most often quoted legalism: "'strict' in theory, fatal in fact." See Gerald Gunther, *The Supreme Court -- 1971 Term -- Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv. L. Rev. 1, 8 (1972).

55. See generally David Orgon Coolidge, *Same-Sex Marriage: As Hawaii Goes ...*, 72 FIRST THINGS 33 (Apr. 1997) (detailing the Hawaii case and the local fallout that followed the Supreme Court's decision).

56. The original statute, as construed by the Supreme Court, only authorized marriage between a man and a woman and the statutory language contained some gender-specific terms. However, it did not specifically limit marriage to one man and one woman. That limiting language was added by the legislature in 1994 so that the amended statute read: "In order to make valid the marriage contract, *which shall be only between a man and a woman*, it shall be necessary that..." HAW. REV. STAT. § 572-1 (2005) (emphasis added).

57. 1994 HAW. SESS. LAWS 526.

sex marriages even if they were valid in the state of residence.⁵⁸ The fifteen states enacted statutes primarily to clarify that even though the state generally recognized marriages performed in other states, it would be against public policy to recognize a same-sex marriage from another state.⁵⁹

On December 3, 1996, after a full trial, the Circuit Court in Honolulu handed down its opinion. Judge Kevin Chang ruled that the state had failed to justify its denial of marriage licenses to same-sex couples.⁶⁰ Specifically, he found that excluding same-sex couples from marrying actually disadvantaged the children whom they might be raising by depriving them of the protection and benefits of having two parents who were married to each other.⁶¹ Based on his review of the expert testimony, Judge Chang found that the State had failed to show that same-sex couples could not provide a satisfactory setting for raising children.⁶² The enforcement of the decision was delayed, pending appeal to the State Supreme Court by the State's new Health Director, Lawrence Miike.⁶³

Debates over DOMA and the effect of the Hawaii court decision occurred in every state. A state-wide DOMA was introduced in at least thirty-four states during 1996, with fifteen states adopting the proposed law. By early 1997, at least twenty-six states that had not yet passed a state-wide DOMA were considering the issue.⁶⁴ A national debate over the issue was now in full swing.

Ultimately, no one in Hawaii ever won the right to marry, despite Judge Chang's ruling. In 1998, the people of Hawaii amended the state

58. Defense of Marriage Act, 1 U.S.C. § 7 (2006). DOMA also provided that states would not be required under "full faith and credit" to recognize same-sex marriages from other states. 28 U.S.C. § 1738C (2006). This provision in DOMA does not require states to reject same-sex marriages from other states. It merely gives them permission to do so, a right that most commentators agree the states already possessed. *See, e.g.,* Gary J. Simson, *Beyond Interstate Recognition in the Same-Sex Marriage Debate*, 40 U.C. DAVIS L. REV. 313, 326 (2006).

59. ALASKA STAT. § 25.05.013 (2008); ARIZ. REV. STAT. § 25-101 (LexisNexis 2007); DEL. CODE ANN. tit. 13, § 101 (1998); GA. CODE ANN. § 19-3-3.1 (1998); IDAHO CODE ANN. § 32-209 (1996); 750 ILL. COMP. STAT. 5/212 (1999); KAN. STAT. ANN. § 23-101 (2007); MICH. COMP. LAWS §§ 551.1, 551.271 (2005); MO. REV. STAT. § 451.022 (2000); N.C. GEN. STAT. § 51-1.2 (2000); OKLA. STAT. tit. 43, § 3.1 (2001); 23 PA. CONS. STAT. § 1704 (2001); S.C. CODE ANN. § 20-1-15 (2007); S.D. CODIFIED LAWS § 25-1-1 (2004); TENN. CODE ANN. § 36-3-113 (2001). A sixteenth state, Utah, had already adopted similar legislation in 1995. UTAH CODE ANN. § 30-1-2 (2007). The governor of Alabama adopted an executive order to the same effect and the two houses in Louisiana adopted a concurrent resolution. *See Coolidge, supra* note 55.

60. *Baehr v. Miike*, No. 91-1394, 1996 WL 694235, at *21 (Haw. Cir. Ct. Dec. 3, 1996).

61. *Id.* at *18.

62. *Id.*

63. *See* David Orgon Coolidge, *Same-Sex Marriage? Baehr v. Miike and the Meaning of Marriage*, 38 S. TEX. L. REV. 1, 15-16 (1997).

64. *See Coolidge, supra* note 55, at 37.

constitution, proclaiming that the legislature had the power to define marriage, and the Hawaii Supreme Court dismissed the case in 1999.⁶⁵ Nonetheless, the Hawaii litigation caused two significant shifts in the battle for marriage equality: (1) the case transformed the national dialogue by bringing the issue of marriage equality to national attention; and (2) the case united the national LGBT public interest lawyers in a coordinated effort to continue litigating test cases.

A. The Change in the National Dialogue

In 1993, not a single state or country recognized relationships between same-sex couples.⁶⁶ Many people were astounded by the thought that a handful of judges in a state like Hawaii could change that situation through a single case.⁶⁷ This was a moment in history unlike any other. When the United States Supreme Court announced that school systems could no longer operate on a segregated basis, that too was a moment in history. However, *Brown v. Board of Education*⁶⁸ did not seem to come out of the blue in the same way that the Hawaii case did. *Brown* resulted from a long and tortured path of litigation against segregation that dated back to 1896, the year the United States Supreme Court handed down its infamous decision in *Plessy v. Ferguson*.⁶⁹ That decision challenged the imposition of segregation in railroad cars and established the doctrine of “separate but equal” as a legitimate constitutional practice.⁷⁰ Litigation to overturn that principle began chipping away at specific instances of segregation. Small victories occurred in 1914⁷¹ and 1917⁷² and larger ones in 1948⁷³ and 1950.⁷⁴ By the

65. HAW. CONST. art. I, § 23 provides: “The legislature shall have the power to reserve marriage to opposite-sex couples.”

66. Several cities and counties had passed domestic partner ordinances that did recognize same-sex couples for limited purposes. For a discussion of early efforts to pass such ordinances, see Barbara J. Cox, “The Little Project.” *From Alternative Families to Domestic Partnerships to Same-Sex Marriage*, 15 WIS. WOMEN’S L.J. 77 (2000). Iowa City, Iowa enacted such an ordinance in 1994. See Iowa City Code, tit. 2, ch. 6, § 2-6-1 to -5 (1994).

67. The legislative history of DOMA in Congress is replete with statements about how judges in Hawaii were forcing same-sex marriage on the rest of the country. For a discussion of this part of the testimony before Congress, see Patricia A. Cain, *DOMA and the Internal Revenue Code*, CHI.-KENT L. REV. (forthcoming 2009) (manuscript at n.30, on file with author).

68. *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954).

69. *Plessy v. Ferguson*, 163 U.S. 537 (1896).

70. See generally *id.*

71. *McCabe v. Athchison, Topeka & Santa Fe Ry.*, 235 U.S. 151 (1914) (ruling that failure to provide separate first class and dining cars for black travelers violated the separate but equal doctrine).

72. *Buchanan v. Warley*, 245 U.S. 60 (1917) (striking down zoning ordinances that created

time *Brown* reached the Supreme Court in 1954, those familiar with the issue understood that there had been a long legal battle and an equally long public debate on the underlying issues.

Prior to the Hawaii litigation, marriage equality for same-sex couples had not been the object of significant public attention and public debate. Even in the law reviews, there had been very little comment. Fewer than twenty law review publications focused on same-sex marriage in the two decades between 1971, when the Minnesota Supreme Court decided *Baker v. Nelson*, and 1991, when the Hawaii litigants filed their complaint.⁷⁵ Most of these publications were student-authored notes or comments.⁷⁶

This situation changed dramatically in the early 1990s when the Hawaii litigation first appeared in the news. One scholar reports the publication of at least seventy-five articles in the period from 1990–1995, coinciding with the first stages of the Hawaii litigation.⁷⁷ He further reports that seventy-two of those articles took positions in favor of the recognition of same-sex

segregated neighborhoods as a violation of freedom of contract).

73. *Shelley v. Kraemer*, 334 U.S. 1 (1948) (striking down a state court's ability to enforce private racially-restrictive covenants).

74. *Sweatt v. Painter*, 339 U.S. 629 (1950) (striking down as a violation of separate but equal the attempt by Texas to avoid segregating its law school by creating a new law school for black students).

75. See, e.g., G. Sidney Buchanan, *Same-Sex Marriage: The Linchpin Issue*, 10 U. DAYTON L. REV. 541 (1985) (arguing that if government loses the marriage issue, it will not be able to distinguish between same-sex and opposite-sex couples in any way); John D. Ingram, *A Constitutional Critique of Restrictions on the Right to Marry -- Why Can't Fred Marry George -- Or Mary and Alice at the Same Time?*, 10 J. CONTEMP. L. 33 (1984) (arguing that restrictions do not pass constitutional muster); Edward Veitch, *The Essence of Marriage -- A Comment on the Homosexual Challenge*, 5 ANGLO-AM. L. REV. 41 (1976) (summarizing cases and including some from outside the United States). For a more complete bibliography of writings on this topic during these two decades, including publications outside the field of law, see HOMOSEXUAL MARRIAGES, KINSEY INSTITUTE (2009), <http://www.kinseyinstitute.org/library/Pdf/HOMOSEXUAL%20MARRIAGES.pdf>.

76. See, e.g., James W. Harper & George M. Clifton, *Heterosexuality: A Prerequisite to Marriage in Texas?*, 14 S. TEX. L. REV. 220 (1973) (discussing gender neutral Texas marriage statutes and focusing on an unpublished case in Texas involving two men who acquired a license while one was dressed in drag, but could not get the license filed); Ted L. Hanson, *Domestic Relations Case Note: Minnesota Marriage Statute Does Not Permit Marriage Between Two Persons of the Same Sex and Does not Violate Constitutionally Protected Rights*, 22 DRAKE L. REV. 206 (1973) (discussing the Minnesota marriage case); Leo Sullivan, *Same-Sex Marriage and the Constitution*, 6 U.C. DAVIS L. REV. 275 (1973) (discussing the Minnesota marriage case); Note, *The Legality of Homosexual Marriage*, 82 YALE L.J. 573 (1973) (emphasizing the role that state adoptions of the Equal Rights Amendment might have on the right to marriage equality); Claudia A. Lewis, *From This Day Forward: A Feminine Moral Discourse on Homosexual Marriage*, 97 YALE L.J. 1783 (1988) (re-evaluating the arguments in support of marriage after the decision in *Bowers* and applying a feminist jurisprudence approach to the issue); *Developments in the Law -- Sexual Orientation and the Law*, 102 HARV. L. REV. 1508, 1605–11 (1989) (textual discussion of same-sex marriage).

77. See Coolidge, *supra* note 55, at 33.

marriage.⁷⁸ In the two and a half years immediately following the decision of the Hawaii Supreme Court and before the introduction of DOMA in Congress, over 140 law review articles gave some attention to the case.⁷⁹ By 1995, same-sex marriage had become a serious topic in the legal academy.

To get a sense of how much national “play” the marriage issue was receiving over this period of time, I did a database search in Westlaw. Using the “USNEWS” database, I queried “same-sex marriage” and related terms⁸⁰ for the years 1990–2008. This research does not produce a precise survey of national coverage on the topic; however, the results are interesting. From 1990–1995, coverage was not significant, averaging around 300 to 400 stories a year,⁸¹ and the stories were often guest editorials or letters to “Dear Abby” and Ann Landers. But then, in 1996, there was a jump in coverage to over 6600 stories.⁸² Of course, 1996 was an election year, but it was also the year that the trial court ruled in the Hawaii case and DOMA legislation was debated across the nation. An increase in news coverage usually means an increased intensity of debate at the national level. A more intense national debate, however, does not necessarily mean that the public is ready to accept a new position on a controversial subject.⁸³ And in fact, with the passage of the federal DOMA and the rush of states to follow with their own versions of DOMA, the outcome for same-sex couples was quite negative. Still, the move from silence to public debate traditionally has been regarded as a prerequisite to the ultimate success of the LGBT civil rights movement.

B. The Emergence of a National Movement for Marriage Equality

Hawaii was important for another reason. Many observers assumed that the Hawaii case was a test case pursued by the national LGBT public interest

78. *Id.*

79. I limited this search to journals in the Westlaw database. It is difficult to find a good comparison to gauge how this citing frequency compares to other “big” state supreme court rulings. I cannot think of another state supreme court case that sparked such immediate interest. *Braschi v. Stahl Associates*, 543 N.E.2d 49 (N.Y. 1989), an important gay rights case from New York, received under fifty cites in a similar period of time. *The Baby M. case, In Re Baby M.*, 537 A.2d 1227 (N.J. 1988), which was decided in 1988 by the Supreme Court of New Jersey amidst a lot of national attention, was cited fewer than sixty times in the following three years.

80. I.e., “homosexual marriage” and “gay marriage.”

81. There were only 148 stories in 1991, growing to 565 stories in 1995. See *infra* app. 1, chart 1.

82. These results are displayed in a bar graph in appendix one at the end of this Article.

83. A 1996 Gallup poll found 68% of the respondents were opposed to same-sex marriage. See Gallup.com, *Gay and Lesbian Rights* (2009), <http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx>. A Pew Research Center poll for the same year showed 65% opposed. See Paul R. Brewer & Clyde Wilcox, *The Polls – Trends: Same-Sex Marriage and Civil Unions*, 69 PUB. OPINION Q. 599, 607 tbl.6 (2005).

law firms, but at the outset this was not true. The plaintiffs did contact the local American Civil Liberties Union (ACLU) group when they first thought about filing a lawsuit in 1990.⁸⁴ The local affiliate checked with the national office and was advised to gauge local community support for the lawsuit.⁸⁵ When the local ACLU tried to survey the community, there was an uprising by community members who were outraged that legal organizations should determine which civil rights claims should or should not be pursued by gay and lesbian people.⁸⁶ As a result, none of the national or local LGBT organizations became part of the suit.⁸⁷ That all changed, however, when the Hawaii Supreme Court handed the litigants an unexpected victory. Lambda and the ACLU became active participants in the litigation.⁸⁸

By 1993, the four key national LGBT legal organizations, Lambda, ACLU Lesbian and Gay Rights Project, Gay and Lesbian Advocates and Defenders (GLAD), and National Center for Lesbian Rights (NCLR), were already in close communication with each other.⁸⁹ After the Hawaii case, they began to focus on marriage litigation. Lambda formed Marriage Protect, headed by Evan Wolfson, who had participated on behalf of Lambda in the Hawaii case.⁹⁰ GLAD began planning its New England strategy.⁹¹ Subsequently, in 2002, Evan Wolfson left Lambda to devote himself full-time to the battle for marriage equality.⁹² In January 2003, he founded Freedom to Marry.⁹³

IV. MOMENT NUMBER TWO: THE MARRIAGES BEGIN

The next moment in the movement for marriage equality occurred in 2004. This designation is based, in part, on the more than 100,000 references

84. See William B. Rubenstein, *Divided we Litigate: Addressing Disputes Among Group Members and Lawyers in Civil Rights Campaigns*, 106 YALE L.J. 1623, 1637–38 (1997).

85. *Id.*

86. *Id.*

87. *Id.*; Coolidge, *supra* note 55, at 34.

88. See DANIEL R. PINELLO, AMERICA’S STRUGGLE FOR SAME-SEX MARRIAGE 25–27 (2006).

89. The legal directors at these organizations instituted regular phone calls and in-person roundtable discussions, often with other movement litigators, as early as the mid-1980s when the primary focus was battling state sodomy statutes. See RAINBOW RIGHTS, *supra* note 7, at 64.

90. See PINELLO, *supra* note 88, at 25.

91. See generally Freedom to Marry, http://www.freedomtomarry.org/evan_wolfson/by/all_together_now.php (last visited September 20, 2009).

92. *Id.*

93. *Id.*

to same-sex marriage in U.S. news stories that year.⁹⁴ This was the first year that legal same-sex marriages became a reality in the United States.

There were some other important legal events that occurred before 2004, and to understand fully the backlash events of 2004, it is helpful to review this earlier history. In 1999, the Vermont Supreme Court ruled that the state's exclusion of same-sex couples from marriage was a violation of the state constitution's guarantee of equal benefits.⁹⁵ Unfortunately, the court then slid backward on the issue of remedy. The court asked the legislature to consider the matter and the legislature responded by enacting the Civil Unions Bill.⁹⁶ Similarly, in response to the litigation, the Hawaii legislature, in an attempt to provide some equality for same-sex couples in the state, enacted a bill that recognized reciprocal beneficiary status.⁹⁷ Two people who were barred by state law from marrying could register as reciprocal beneficiaries and receive a handful of state benefits.⁹⁸ The Vermont measure, by contrast, was monumental. Registering as civil union partners in Vermont would extend 100% of the benefits of marriage provided by the State.⁹⁹ While this was an important advance for recognition of same-sex couples, it was not marriage.¹⁰⁰

The Vermont decision did, however, trigger a new public debate on the question of whether same-sex relationships should be recognized at all. Nebraska responded with a new type of backlash. Nebraska amended its state constitution in 2000 to prevent the State from recognizing any sort of relationship between two persons of the same sex, whether it be a marriage, a civil union, or a domestic partnership with limited benefits.¹⁰¹ By 2008, eighteen additional states had joined Nebraska by adopting similar

94. See *infra* app. 1.

95. *Baker v. Vermont*, 744 A.2d 864 (Vt. 1999).

96. VT. STAT. ANN. tit. 15, §§ 1201–1207 (2000).

97. HAW. REV. STAT. ANN. §§ 572C-1 et seq.

98. See HAW. REV. STAT. ANN. § 572C-2.

99. VT. STAT. ANN. tit. 15, § 1204(a) (2000).

100. Other states would not recognize the relationship as a marriage. See *Burns v. Burns*, 560 S.E.2d 47 (Ga. Ct. App. 2002) (refusing to equate civil union with marriage in applying post-divorce child visitation restriction preventing child from visiting if mother was cohabiting outside the bounds of legal marriage); *Langan v. St. Vincent's Hosp. of N.Y.*, 802 N.Y.S.2d 476 (N.Y. App. Div. 2005), *appeal dismissed*, 850 N.E.2d 672 (N.Y. 2006) (holding that a surviving partner in a civil union cannot be treated as a spouse for purposes of bringing a wrongful death action).

101. See NEB. CONST. art. I, § 29. This section was upheld in *Citizens for Equal Prot. v. Bruning*, 455 F.3d 859 (8th Cir. 2006). Section 29 specifically provides: "Only marriage between a man and a woman shall be valid or recognized in Nebraska. The uniting of two persons of the same sex in a civil union, domestic partnership, or other similar same-sex relationship shall not be valid or recognized in Nebraska." NEB. CONST. art. I, § 29.

constitutional amendments.¹⁰²

While Vermont had presented the possibility of marriage as much as Hawaii had done, it turned out to be a blip on the screen compared to the events of 2003 and 2004. In late 2003, the Supreme Judicial Court of Massachusetts ruled in favor of same-sex marriage, under both the due process and the equal protection provisions of the state constitution.¹⁰³ When the state legislature asked whether civil unions would be sufficient to cure the constitutional problem, the court answered with a resounding “no.”¹⁰⁴ It ordered the state to begin issuing marriage licenses to same-sex couples by no later than May 2004.¹⁰⁵

This action by the Massachusetts court angered those who viewed such decisions as unwarranted examples of judicial activism. President Bush referenced the event in his 2004 State of the Union address. Towards the end of his remarks, he spoke the following words:

A strong America must also value the institution of marriage Activist judges, however, have begun redefining marriage by court order, without regard for the will of the people and their elected representatives. On an issue of such great consequence, the people’s voice must be heard. If judges insist on forcing their arbitrary will upon the people, the only alternative left to the people would be the constitutional process. Our nation must defend the sanctity of marriage.

Gavin Newsom, the newly elected mayor of San Francisco, was in the audience and heard the president’s remarks. He felt a sense of outrage at the discriminatory force of Bush’s statement.¹⁰⁶ His first call after this event was to his office in San Francisco to ask his staff to begin researching what he, as mayor, might do to defend the sanctity of marriage for gay men and lesbians.¹⁰⁷

And thus began what some have dubbed the “Winter of Love.”¹⁰⁸

102. See *infra* app. 3 (listing these states).

103. See *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

104. See *Opinion of the Justices to the Senate*, 802 N.E.2d 565 (Mass. 2004).

105. *Goodridge*, 798 N.E.2d at 970 (“Entry of judgment shall be stayed for 180 days to permit the Legislature to take such action as it may deem appropriate in light of this opinion.”).

106. For a description of these events in more detail, see Patricia A. Cain & Jean C. Love, *One Wedding and a Revolution: A Film by Debra Chasnoff*, 24 ST. LOUIS U. PUB. L. REV. 11, 13–14 (2005). The Chasnoff film records Mayor Gavin’s decision to issue marriage licenses to same-sex couples, chronicles the first lesbian marriage ceremony performed at City Hall, and provides general information about what has come to be known in San Francisco as the “Winter of Love.” *Id.*

107. *Id.*

108. PINELLO, *supra* note 88, at 74.

Mayor Newsom led the way by authorizing the issuance of marriage licenses to same-sex couples in San Francisco. Between February 12 and March 11, when the California Supreme Court issued a stay suspending the issuance of licenses, San Francisco officials had wed over 4000 same-sex couples.¹⁰⁹ Mayor Newsom's actions inspired similarly-minded mayors in the states of New York and Oregon.¹¹⁰ County clerks in New Mexico also began issuing licenses to same-sex couples.¹¹¹ Nightly news programs showed same-sex couples surrounded by a multitude of friends and family members, pledging their love and commitment to each other. Current estimates suggest that between February and April of 2004, more than 7000 same-sex partners were married in the United States.¹¹² While all of these marriages have been ruled void,¹¹³ the moment was nonetheless important for its effect on the national debate. The number of news stories focusing on same-sex marriage increased dramatically.¹¹⁴ People witnessed same-sex marriage celebrations on television and heard reporters comment on the events. The world did not come to an end; however, the backlash did step up. In 2004, thirteen states added constitutional amendments banning same-sex marriages, and in most cases, banning any form of legal recognition for same-sex couples.¹¹⁵

As a direct result of mayoral actions in San Francisco, New York, and Oregon, litigation over the equal right to marry for gay and lesbian persons stepped up. The California marriage case was a direct result of Mayor Newsom's actions.¹¹⁶ The Oregon marriage case was similarly a direct result

109. See Cain & Love, *supra* note 106, at 16.

110. See Sylvia A. Law, *Who Gets to Interpret the Constitution? The Case of Mayors and Marriage Equality*, 3 STAN. J.C.R. & C.L. 1 (2007).

111. See PINELLO, *supra* note 88, at 4.

112. *Id.* at 19.

113. The San Francisco marriages were ruled void in *Lockyer v. City & County of S.F.*, 95 P.3d 459 (Cal. 2004). The California Supreme Court later ruled that the California Constitution required marriage equality for same-sex couples. *In re Marriage Cases*, 183 P.3d 384, 453 (Cal. 2009). Couples who had married in 2004 would have to obtain a new marriage license and go through a new marriage ceremony to become validly married. *Id.* The New York Court of Appeals ultimately decided that limiting marriage to opposite-sex couples did not violate the New York Constitution. See *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006). The Oregon marriages resulted in litigation that went to that state's top court, which ruled the marriages void. See *Li v. State*, 110 P.3d 91 (Or. 2005).

114. See *infra* app. 1.

115. The thirteen states were Arizona, Georgia, Kentucky, Louisiana, Michigan, Mississippi, Missouri, Montana, North Dakota, Ohio, Oklahoma, Oregon, and Utah. A map that shows the status of all states, including which states have constitutional amendments that ban same-sex relationships beyond marriage, can be found at National Gay and Lesbian Task Force, Anti-Gay Marriage Measures in the U.S., http://www.thetaskforce.org/downloads/reports/issue_maps/GayMarriage_05_09.pdf.

116. See *In re Marriage Cases*, 183 P.3d at 384–85.

of the licenses granted in Multnomah County during the “Winter of Love.”¹¹⁷ The New York marriage cases were filed days after then-Attorney General Eliot Spitzer issued an opinion ordering mayors and clerks in New York to stop issuing marriage licenses to same-sex couples.¹¹⁸ Petitioners filed these three cases in 2004, as did the couples who filed in Washington, Connecticut, and Maryland.¹¹⁹

In retrospect, 2004 was a major moment in the history of the battle for marriage equality. It not only included the beginning of legal marriage, but also included a strong backlash. Public opinion polls shifted during the year. In at least two polls, opposition to same-sex marriage increased in late 2003 and early 2004.¹²⁰ Events which may have contributed to this change in public opinion were the *Lawrence v. Texas*¹²¹ decision, handed down in June of 2003, the *Goodridge* decision the Supreme Judicial Court of Massachusetts issued in November of 2003,¹²² and Mayor Gavin Newsom’s decision to issue marriage licenses to same-sex couples in February of 2004. News coverage of same-sex marriage spiked in the periods following these events.¹²³ In 2003, the Pew Research Center for the People and the Press added a question to its news interest survey about how closely people were following news stories on same-sex marriage.¹²⁴ In August 2003, 19% of the respondents reported they were following such stories “very closely.”¹²⁵ By March of 2004, that number had increased to 29%, but then it dropped back

117. See *Li*, 110 P.3d at 94.

118. See *Hernandez*, 855 N.E.2d at 1.

119. See *infra* app. 2 (listing all post-Massachusetts marriage cases).

120. According to the Pew Research Center, opposition to same-sex marriage spiked at 63% in February of 2004, then dipped to 56% by August, and then began to rise again until it reached 61%. See PEW RESEARCH CTR. FOR THE PEOPLE & THE PRESS, LESS OPPOSITION TO GAY MARRIAGE, ADOPTION AND MILITARY SERVICE (Mar. 22, 2006) <http://people-press.org/report/273/less-opposition-to-gay-marriage-adoption-and-military-service> [hereinafter Pew Research Center Report]. Opposition has steadily declined since the 61% high point at the end of 2004. *Id.*; see also Brewer & Wilcox, *supra* note 83, at 607 tbl.6.

121. *Lawrence v. Texas*, 539 U.S. 558 (2003).

122. *Goodridge v. Dep’t of Pub. Health*, 798 N.E.2d 941 (Mass. 2003).

123. The data collected for Appendix One shows that for the months before June 2003 (the date of the *Lawrence* decision), news stories on same-sex marriage ranged between 130 and 190 a month. In July and August, coverage spiked to well over 1000 stories a month, then fell to around 500 a month until November, when coverage spiked again to 1490 stories, followed by 1888 in December, 2971 in January of 2004, and over 20,000 stories in February.

124. See Brewer & Wilcox, *supra* note 83, at 606 tbl.3.

125. *Id.*

down to 20% in the following months.¹²⁶ This intense interest in the same-sex marriage issue seems to correspond to firmer opposition to marriage equality, i.e., another backlash.¹²⁷ But victory and backlash are typical in civil rights movements. The question at such moments becomes whether the steps forward will continue to hold their ground even as the steps backward give up important territory.

V. MOMENT NUMBER THREE: OTHER STATES JOIN MASSACHUSETTS

Moment number three occurs in that space of time between May 2008 and April 2009, when the Supreme Courts of California, Connecticut, and Iowa joined the Massachusetts Supreme Judicial Court by ruling in favor of same-sex marriage.¹²⁸ In the first four years that marriage was legal only in Massachusetts, it is estimated that 10,000 same-sex couples married in the state, with over half of those marriages occurring in the first six months after the decision became effective.¹²⁹ A major explanation for the low number of same-sex marriages was the existence of an old 1913 statute that prevented Massachusetts from issuing marriage licenses to couples from other states.¹³⁰ That statute prevented the state from issuing marriage licenses to couples who resided in states that would not recognize the marriage.¹³¹ In 2006, the statute was challenged in court and upheld by the Massachusetts Supreme Judicial Court.¹³² By 2006, there were only three states that were sufficiently free of statutory provisions, constitutional amendments, and negative judicial opinions to be able to consider granting recognition of a

126. *Id.* (noting that in March of 2004, the total percentage following the stories both “very closely” and “fairly closely” peaked at 62%).

127. *Id.* at 607 tbl.6 (Pew Research Center Poll showing spike in opposition at 63% in February 2004); *id.* at 609 tbl.12 (NBC News Poll showing a similar spike at 61% in March 2004); *id.* at 609 tbl.14 (CBS News Poll showing a similar spike at 62% in February 2004). It is difficult to read the array of polls on this subject as showing anything other than a fairly constant level of opposition to same-sex marriage, typically well over 50% and it is not unusual to see opposition levels above 60%.

128. *See In re Marriage Cases*, 183 P.3d 384 (Cal. 2008); *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008); *Varnum v. Brien*, 763 N.W.2d 862 (Iowa 2009).

129. CNN reports that 6100 marriages occurred in the first six months. *See* Deborah Feyerick & Sheila Steffen, *Same-Sex Marriage In Massachusetts, 4 Years Later*, CNN.COM, June 16, 2008, <http://www.cnn.com/2008/US/06/16/feyerick.samesex.marriage/index.html>.

130. MASS. GEN. LAWS ANN. ch. 207, § 11 (West 1913) (repealed 2008) was directed at who may not marry in Massachusetts and provided as follows: “No marriage shall be contracted in this commonwealth by a party residing and intending to continue to reside in another jurisdiction if such marriage would be void if contracted in such other jurisdiction, and every marriage contracted in this commonwealth in violation hereof shall be null and void.”

131. *Id.*

132. *See Cote-Whitacre v. Dep’t of Pub. Health*, 844 N.E.2d 623 (Mass. 2006). The legislature repealed the statute in 2008. MASS. GEN. LAWS ch. 216, § 1 (2008).

Massachusetts marriage: New Mexico, New York, and Rhode Island.¹³³ As a result, marriages for same-sex couples were primarily confined to Massachusetts residents.¹³⁴

This confinement appears to have produced some breathing room. Restricting marriage to Massachusetts residents reduced the possibility that courts in other states would be asked to accord respect to same-sex marriages. Opponents of marriage equality in Massachusetts fought to amend the state constitution, but those attempts failed.¹³⁵ Similar attempts to amend the Federal Constitution also failed.¹³⁶ Both of these failures helped hold the backlash in check.

Even though the backlash may have stalled for a bit, very little positive progress was made in the four years following the *Goodridge* decision. Between 2004 and 2008, there were seven final decisions by state appellate courts in same-sex marriage cases. All of them were negative.¹³⁷

The situation began to change dramatically on May 15, 2008. The California Supreme Court interpreted the state constitution’s privacy, liberty, and equal protections clauses to mandate the extension of marriage to same-sex couples.¹³⁸ Thirty days after the decision was handed down, same-sex couples flocked to county clerk offices seeking marriage licenses.¹³⁹ California law did not restrict applicants for licenses on the basis of residency. As a result, non-residents joined the long lines of same-sex

133. *Cote-Whitacre*, 844 N.E.2d at 658–59 (discussing the status of New York and Rhode Island law). In addition, New Mexico has no statute or constitutional amendment banning same-sex marriage. For a discussion of the New Mexico marriage statute and why it might be construed to permit same-sex marriage, see PINELLO, *supra* note 88, at 1–5.

134. Intent to reside in Massachusetts after the marriage was the legal basis for establishing residency, as it is in most states. There is anecdotal evidence that the clerk in Provincetown was willing to issue licenses without making the couples establish intent regarding Massachusetts residency. Thus, some non-residents did acquire licenses. Other same-sex couples in the United States travelled to Canada to marry once that country began issuing same-sex marriage licenses. But until recently, none of those marriages has been recognized in other states. Those marriages should now be recognized by Iowa.

135. The Associated Press, *Gay Marriage Ban Blocked in Massachusetts*, MSNBC.COM, June 14, 2007, <http://www.msnbc.msn.com/id/19231915/>.

136. The Federal Marriage amendment has been introduced in Congress several times, but has never passed. See Aly Parker, *Can’t Buy Me Love: Funding Marriage Promotion Versus Listening to Real Needs in Breaking the Cycle of Poverty*, 18 S. CAL. REV. L. & SOC. JUST. 493, 510 (2009).

137. See *infra* app. 2 for a list of all cases decided after *Goodridge*.

138. *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008).

139. *In re Marriage Cases*, 183 P.3d 384, was handed down on May 15, 2008. The Court has thirty days after a decision is handed down to determine whether or not to grant a rehearing. That deadline ran out on June 16, so June 17 became the first workday that county clerks were authorized to issue marriage licenses. See Wyatt Buchanan, *Same-sex Marriages Can Start June 17*, S.F. CHRON., May 29, 2008, available at <http://www.sfgate.com/cgi-bin/article.cgi?f=/c/a/2008/05/28/BA5110UTJS.DTL>.

couples on June 17th at City Hall in San Francisco. Even though the people of California halted the issuance of marriage licenses to same-sex couples by adopting Proposition 8 at the polls in November of 2008,¹⁴⁰ the 18,000 same-sex couples who were married between June and November remain validly married under California law.¹⁴¹

In October of 2008, the Connecticut Supreme Court ruled, in accord with the California court, that under the Connecticut constitution, same-sex couples had a right to equal access to marriage.¹⁴² In both California and Connecticut, the courts ruled that discrimination on the basis of sexual orientation was entitled to heightened scrutiny.¹⁴³ Also, at the time of the high court ruling, in both of these states, same-sex couples were already enjoying spousal benefits under statutes that allowed them to register as domestic partners (California)¹⁴⁴ or to unite as partners in a civil union (Connecticut).¹⁴⁵ As a consequence, both opinions were squarely about the right to marry and not about equal benefits under state law.

The Iowa decision, based on the state's equal protection clause, followed in April of 2009, stunning many people across the nation who were unfamiliar with Iowa's history of tolerance and support of civil rights.¹⁴⁶ Iowa became the first state since Massachusetts to move directly from no state-wide recognition to marriage for same-sex couples. Suddenly, in less than a year, three state supreme courts, one on each coast and one in the heartland, had ruled in favor of marriage equality.

The Iowa decision was unique for two reasons. First, the court's decision was unanimous. Second, it broke the silence that has existed in other court opinions about the role of religion in this matter. Justice Cady

140. Proposition 8 added the following language to article I, section 7.5 of the California Constitution: "Only marriage between a man and a woman is valid or recognized in California."

141. The California Supreme Court upheld the validity of Proposition 8 in *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009). The court also ruled that Proposition 8 could not be applied retroactively to void any of the marriages validly entered into before the passage of Proposition 8. *Id.* at 122.

142. *Kerrigan v. Comm'r of Pub. Health*, 957 A.2d 407 (Conn. 2008).

143. See *In re Marriage Cases*, 183 P.3d at 441–42 (applying strict scrutiny); *Kerrigan*, 957 A.2d at 431–76 (applying intermediate-level scrutiny).

144. *In Re Marriage Cases*, 183 P.3d at 397–98.

145. *Strauss*, 957 A.2d at 413.

146. See generally Brief Amici Curiae of Iowa Professors of Law & History, *Varnum v. Brien*, 763 N.W.2d 862, No. 07-1499 (Iowa 2009), available at <http://data.lambdalegal.org/pdf/legal/varnum/iowa-historians-and-law-professors-iowa-supreme-court-brief.pdf> [hereinafter *Iowa Professors' Amicus Brief*]. The brief stresses the many times that the Iowa Supreme Court has been at the forefront in matters of civil rights, striking down both segregation in schools and in public accommodations almost 100 years before the United States Supreme Court did so. See *id.* at 16–18. The Iowa courts were responsible for admitting the first woman in the United States to the practice of law, despite a state statute at the time that limited the profession to male lawyers. See *id.* at 11.

wrote:

Now that we have addressed and rejected each specific interest advanced by the County to justify the classification drawn under the statute, we consider the reason for the exclusion of gay and lesbian couples from civil marriage left unspoken by the County: religious opposition to same-sex marriage. The County’s silence reflects, we believe, its understanding this reason cannot, under our Iowa Constitution, be used to justify a ban on same-sex marriage.

While unexpressed, religious sentiment most likely motivates many, if not most, opponents of same-sex civil marriage

. . . .

. . . Whether expressly or impliedly, much of society rejects same-sex marriage due to sincere, deeply ingrained—even fundamental—religious belief.

Yet, such views are not the only religious views of marriage. As demonstrated by amicus groups, other equally sincere groups and people in Iowa and around the nation have strong religious views that yield the opposite conclusion.

This contrast of opinions in our society largely explains the absence of any religion-based rationale to test the constitutionality of Iowa’s same-sex marriage ban. Our constitution does not permit any branch of government to resolve these types of religious debates and entrusts to courts the task of ensuring government avoids them. . . . [W]e proceed as civil judges, far removed from the theological debate of religious clerics, and focus only on the concept of civil marriage and the state licensing system that identifies a limited class of persons entitled to secular rights and benefits associated with civil marriage.

We, of course, have a constitutional mandate to protect the free exercise of religion in Iowa, which includes the freedom of a religious organization to define marriages it solemnizes as unions between a man and a woman. . . .

As a result, civil marriage must be judged under our constitutional standards of equal protection and not under religious doctrines or the religious views of individuals. This approach does not disrespect or denigrate the religious views of many Iowans who may strongly believe in marriage as a dual-gender union, but considers, as we must, only the constitutional rights of all people, as expressed by the promise of equal protection for all. We are not permitted to do less and would damage our constitution immeasurably by trying to do more.¹⁴⁷

This break in the silence about religion and its role in the same-sex marriage debate is a positive step forward. There is a high correlation

147. *Varnum v. Brien*, 763 N.W.2d 862, 904–05 (Iowa 2009).

between religious beliefs and opposition to same-sex marriage.¹⁴⁸ People who are very religious find it difficult to separate civil marriage from religious marriage. The backlash in California that led to the passage of Proposition 8 was financed primarily by the Mormon Church.¹⁴⁹ The first advertisement that opponents of same-sex marriage launched was one that said same-sex marriage threatened to take away the tax-exempt status of California churches.¹⁵⁰ As Justice Cady explains so well, that is a result that would be impermissible under our Federal Constitution.¹⁵¹ His decision to tackle the religion issue, rather than to ignore it, is likely to provide a useful dose of reason into an otherwise intemperate debate.

The Iowa case may prove influential in the future in other ways as well. Its timing was certainly key in keeping the debate alive. As the last decision in a line of cases, the fact that it came out on the side of marriage equality adds some strength to that side of the debate. There will certainly be backlash in Iowa. The Republicans in the state legislature have already tried to introduce a constitutional amendment that would ultimately go to the people.¹⁵² But so far, they have not been successful.¹⁵³ Iowa, unlike California, does not have a provision allowing the people of the state to amend the constitution through the initiative process. That means any constitutional amendment will have to be approved by the state legislature first.¹⁵⁴

Some observers say that the tide turned with Iowa. They may be right. Although the marriage litigation in state courts is over, at least for now,¹⁵⁵

148. See Harmony Rhoades, *The Framing of Same-Sex Marriage: An Analysis of Public Opinion* (Aug. 10, 2006) (Paper Presented at the Annual Meeting of the American Sociological Association, Montreal Convention Center, Montreal, Quebec, Canada), www.allacademic.com/meta/p103751_index.html; see also Pew Research Center Report, *supra*, note 120.

149. The Church did not contribute directly. Its primary contribution was in getting individual Mormons to contribute. For more information, go to www.mormonsfor8.com.

150. Youtube.com, *Vote Yes on Prop 8*, www.youtube.com/watch?v=4kKn5LNhNto (last visited Sept. 20, 2009).

151. *Varnum*, 763 N.W.2d at 905.

152. See Mike Glover, *Iowa Senate Leader Rules Out Gay Marriage Debate*, ABC NEWS, April 7, 2009, <http://abcnews.go.com/Politics/wireStory?id=7277498>.

153. *Id.*

154. *Id.*

155. See *infra* app. 3 (listing the nine states where it would still be possible to bring a test case challenging the marriage statutes on state constitutional grounds; presently, there are no cases pending in those states and no LGBT public interest lawyers have plans to file any new lawsuits). Private attorneys Ted Olson and David Boies, who were on opposing sides in the *Bush v. Gore* litigation, have filed a challenge to Proposition 8 in federal district court in San Francisco. They are challenging the marriage restriction under the Fourteenth Amendment of the U.S. Constitution.

that does not stop legislatures from debating the issue and, in some states, passing marriage equality legislation.¹⁵⁶ The Vermont legislature did just that shortly after the Iowa decision was handed down.¹⁵⁷ New Hampshire followed, passing a law that will extend marriage to same-sex couples as of January 1, 2010.¹⁵⁸ Bills have been introduced in other states as well. The New York General Assembly has passed a measure, and Governor Paterson, who is supportive, has agreed to press for passage by the Senate in September.¹⁵⁹ A recent poll showed that a majority of New Yorkers support such a measure.¹⁶⁰ There are at least fifteen additional states that could adopt same-sex marriage legislatively without having to put the issue before the people.¹⁶¹ Iowa may be the last state to extend marriage equality by court decision, but it may serve as a major impetus for other states to follow legislatively. By supporting marriage equality in the heartland, the Iowa Supreme Court has caught the attention of a nation that, before *Varnum v. Brien*, typically thought of “gay marriage” as an issue only for New York, California, Massachusetts, and other coastal states.¹⁶² Several state legislatures have already acted to extend marriage equality to same-sex couples. And, even in states with marriage bans written into their constitutions, legislatures have begun to enact alternative forms of recognition.¹⁶³

156. See *infra* app. 3 for a list of the states where the legislatures would be free to enact same-sex marriage because they are unconstrained by a constitutional amendment. The Maine legislature similarly passed a marriage equality bill, but it was repealed at the ballot box on November 3, 2009, under Maine’s “People’s Veto” procedure. For details, visit the Secretary of State’s web page at <http://www.maine.gov/sos/cec/elec/>.

157. 2009 Vt. Acts & Resolves 3. The law becomes effective September 1, 2009.

158. See H.B. 436, 2009 Sess. (N.H. 2009).

159. See Danny Hakim, *With Senator Astir, Governor Will Delay Same-Sex Marriage Bill*, N.Y. TIMES, July 10, 2009, at A13.

160. A June 23, 2009 poll by Quinnipiac University showed that 51% of New Yorkers support same-sex marriage. See *New York State Voters Support Same-Sex Marriage Quinnipiac University Poll Finds; Mayor Should Keep School Control, But Share It*, QUINNIPAC UNIV., June 23, 2009, <http://www.quinnipiac.edu/x1318.xml?ReleaseID=1340>. As this Article was in final edit, the New York Senate had not yet acted. On November 19, 2009, the New York Court of Appeals ruled narrowly in *Godfrey v. Spano*, __ N.E.2d __, 2009 WL 3849908 (N.Y. 2009), that it was proper for officials to recognize out-of-state same-sex marriages for purposes of benefits, but refused to rule more broadly that such out-of-state marriages should be generally recognized, and instead called on the legislature to take action on the marriage question.

161. See *infra* app. 3.

162. See, e.g., Scott Simon, *Iowa Turns Toward Gay Rights* (NPR radio broadcast Apr. 4, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=102747574> (saying that the Iowa decision “marks some kind of turning point”).

163. On June 1, 2009, the Nevada legislature overrode the Governor’s veto and enacted a comprehensive form of domestic partnership status, for both same-sex and opposite-sex couples. S.B. 283, 75th Leg. (Nev. 2009). Later in June, the Wisconsin legislature passed more limited

VI. CONCLUSION: THE FUTURE

In any civil rights movement, the most important measure of a turn in the tide is public opinion. My thesis in this Article is that there have been three important moments in the movement for marriage equality. At each of these moments, the extent and nature of the public dialogue has shifted.

The first moment, in 1996, resulted in a significant increase in public awareness of the issue. The results in that year, especially the passage of the federal DOMA, were negative for proponents of marriage equality, but the stage was set for a widespread national debate. Public opinion polls at that time showed a nation that was almost 70% opposed to the idea of same-sex marriage.¹⁶⁴

The next moment, in 2004, exposed even more people to the issue. Marriage equality was no longer just a hypothetical possibility. Beginning with the San Francisco marriages in February, the entire nation began seeing images of real people celebrating marriage and a commitment with a partner of the same sex. Two polls at that time showed a spike in opposition to marriage equality, reaching as high as 63%.¹⁶⁵ But, by the end of 2004, most polls on the issue showed opposition somewhat lower, between 50% and 60%.¹⁶⁶ More recent polls show that the percentage of those opposed has declined even further, yet it tends to stay above 50%.¹⁶⁷

If the 2004 trend were to be repeated in 2009, in response to the growth in the number of states that currently recognize same-sex marriage rights, we should expect another spike in opposition. However, in late April, less than a month after the Iowa decision, an ABC News/Washington Post poll showed that almost half the country supports the idea of same-sex marriage. Opposition was at a low of 46%.¹⁶⁸ Those favoring marriage were at an all-

domestic partnership legislation. See A.B. 75, 2009–2010 Leg. (Wis. 2009). Wisconsin is the first state with a constitutional amendment that bans not only marriages but, in addition, any similar status. A.B. 75 was drafted to provide as many benefits as possible without violating the constitutional provision.

164. A 1996 Gallup poll found that 68% of the respondents were opposed to same-sex marriage. See Gallup.com, *Gay and Lesbian Rights* (2009), <http://www.gallup.com/poll/1651/Gay-Lesbian-Rights.aspx>.

165. Brewer & Wilcox, *supra* note 83 (citing Pew Research Center poll at tbl.6 and the CBS News Poll at tbl.14).

166. A Gallup poll in May 2004 showed 55% opposition. Later Gallup polls showed an increase, but the sample numbers are small. For other polls, see Brewer & Wilcox, *supra* note 83, at 607–09 tbls.4–14.

167. See The Pew Forum on Religion and Public Life, *Public Opinion on Gay Marriage: Opponents Consistently Outnumber Supporters* (July 9, 2009), <http://pewforum.org/docs/?DocID=424>.

168. See Jennifer Agiesta & Alec MacGills, *Poll: Rising U.S. Support for Social Issues, Such as Gay Marriage*, WASH. POST, Apr. 30, 2009, available at www.washingtonpost.com/wp-dyn/content/article/2009/04/30/AR2009043001640.html. This poll shows the highest amount of

time high of 49%. Other polls show a lower degree of support, but almost all of these polls show the percentages favoring same-sex marriage on a positive slope over time,¹⁶⁹ making the 2009 experience different from the 2004 experience.¹⁷⁰

Some polls have traditionally asked a simple yes or no question as to whether the person supports same-sex marriage. Other polls ask for the strength of the person’s support or opposition.¹⁷¹ More recently, some polls have started to ask a three-option question: (1) Do you support marriage?; (2) Do you support civil unions, and oppose marriage?; (3) Do you support no legal recognition at all?¹⁷² The most recent reports from these polls show that under 40% of the population is opposed to both marriage and civil unions. Most polls show a fairly even split at one-third each for the three different options.¹⁷³

Thus, while we may not have a national consensus on marriage equality, we are close to consensus on legal recognition of same-sex relationships. The battle will likely continue state-by-state for the near future, with some states adopting marriage and others adopting civil unions or domestic partnerships. Given the amount of support for some form of recognition, we may even see a return to the ballot boxes in some states to undo the hastily-added constitutional amendments that banned all forms of recognition.

Geographic differences will no doubt continue to prevent the country from adopting uniform recognition provisions. And it may well require action by the United States Supreme Court to bring some degree of equality to all of the states,¹⁷⁴ which has happened before. In 1967, when the

support for marriage equality that has ever been reported. *Id.* For example, 49% were in support, 46% were opposed, and the rest were “unsure.” *Id.*

169. For a summary of all related polls, go to *Same-Sex Marriage, Gay Rights* (2009), <http://pollingreport.com/civil.htm> [hereinafter Polling Report]. The CBS poll shows a positive slope through April of 2009, but then dips in June. Nonetheless, the June results are not below the March 2009 results. *Id.* Thus, even this poll shows support holding, rather than receding (as it did in 2004). The CBS poll reported a margin of error of plus or minus three points. *Id.*

170. See Nate Silver, *Fact of Fiction on Gay Marriage Polling*, FIVETHIRTYEIGHT, Apr. 9, 2009, <http://www.fivethirtyeight.com/2009/04/gay-marriage-by-numbers.html>. This site plots results of polls over time, indicating an increasing amount of support for marriage and civil unions, and notes that the post-*Goodridge* polls indicated a short-term reversal of support. *Id.*

171. Polling Report, *supra* note 170.

172. The CBS News survey uses this approach. See Brewer & Wilcox, *supra* note 83, at 612 tbl.23.

173. See PollingReport.com, *Same-Sex Marriage, Gay Rights*, CBS News/New York Times Poll (June 12–16, 2009), <http://www.pollingreport.com/civil.htm>; PollingReport.com, *Same Sex Marriage, Gay Rights*, Fox News/Opinion Dynamics Poll (May 12–13, 2009), <http://www.pollingreport.com/civil.htm>.

174. Whether Congress has the power to create a uniform marriage law that would apply in all states is a debated question. The debate centers on whether the Commerce Clause can be construed

Supreme Court struck down Virginia's anti-miscegenation law in *Loving v. Virginia*,¹⁷⁵ it effectively removed all such laws from the statute books of the last sixteen states where they were still in force. In 1948, California had become the first state to strike down an anti-miscegenation statute in a court challenge.¹⁷⁶ Between 1952 and 1967, fourteen states had repealed their anti-miscegenation statutes.¹⁷⁷ Polls from 1948 showed 90% opposed to interracial marriages.¹⁷⁸ By 1967, that number had declined to only 72%.¹⁷⁹

Given that current polls show opposition to same-sex marriage only at 50% to 60% (and opposition to civil unions much lower), it would not be surprising to see success in a federal challenge to state laws that continue to ban marriage and civil unions. In my view, however, that result seems unlikely until we have near uniformity among the states. As of June 2009, we have fifteen states that provide some form of state-wide recognition.¹⁸⁰ Over the next year, it is predicted that several additional states will adopt some form of recognition legislation.¹⁸¹ As the number of states grows, I believe the chance for success in federal court grows.¹⁸²

Iowa has been a leader in civil rights causes before. In the battle to recognize interracial marriage, Iowa was the third state in the nation to repeal its anti-miscegenation law.¹⁸³ That occurred in 1851. Now, in 2009, it finds itself in a select group of only six states willing to extend equal dignity and respect to same-sex committed couples. I believe this is an important moment in the battle for marriage equality. And, if the support expressed in the most recent polls holds, it is likely to be a turning point.

broadly enough to authorize congressional regulation in the area of family law, which has traditionally been left to the states.

175. *Loving v. Virginia*, 388 U.S. 1 (1967).

176. *Perez v. Sharp*, 198 P.2d 17 (Cal. 1948).

177. *Loving*, 388 U.S. at 7 n.5.

178. See B.A. Robinson, ReligiousTolerance.org, Single U.S. Public Opinion Polls: Same-sex Marriages and Civil Unions (Sept. 25, 1996), http://www.religioustolerance.org/hom_mar_p.htm.

179. *Id.*

180. See *infra* app. 3.

181. The list of likely states that will adopt some form of recognition statute includes New York, Pennsylvania, Illinois, Delaware, Rhode Island, and New Mexico. These states are all in category four of the chart found at app. 3.

182. I made a similar argument for the Supreme Court to strike down sodomy laws in *Lawrence*. See Cain, *The Right to Privacy Under the Montana Constitution: Sex and Intimacy*, 64 MONT. L. REV. 99, 130–31 (2003) (arguing in part that a person's basic liberty interest should not change as he or she crosses state lines, and, as a result, the Supreme Court should be compelled at some point to ratchet up all state protections for individual rights to a presumptive minimum level of protection in each state).

183. The law was repealed in 1851. See Iowa Professors' Amicus Brief, *supra* note 146, at 14.

APPENDIX ONE

Results of a search for news items in the Westlaw database “USNEWS”

The two charts on the following page report the number of items, by year, retrieved from the Westlaw database “USNEWS” when using a simple search for “same-sex marriage,” “homosexual marriage,” or “gay marriage.” The results are reported as bar graphs arranged by years in groups of three years. Because the scale changed dramatically in 2004, the graphs can be read more accurately if they are divided into two time periods. Chart One includes years 1991–2002 and Chart Two includes years 2003–2008 as well as the first six months of 2009.

In the early years that I queried, I also skimmed the stories to see what sort of things they included. The coverage before 1990 was minimal and mostly involved letters to *Ann Landers* or *Dear Abby* columns. In 1990, a case challenging the marriage law restrictions was filed in the District of Columbia and seemed to explain a slight increase in coverage.¹⁸⁴ That was also the year of Justice Souter’s confirmation hearings and that event appears to have stimulated news stories mentioning same-sex marriage as a legal issue. Nonetheless, there were only 148 stories that year.

The number of stories increased beginning in 1991, when the first rumblings of the Hawaii case were felt. The plaintiffs filed their complaint that year. Stories mentioning same-sex marriage issues numbered 224 in 1991 and increased to 659 in 1992. The highest number of stories in Chart One occurred in 1996, the year that DOMA was passed by Congress and that same-sex marriage was part of the election year debates. For 1996, the total number of stories was 6601.

The top year for Chart Two was 2004—the year in which same-sex marriages were first celebrated in Massachusetts and the year of the “Winter of Love.” The number of stories for that year was over 100,000. The number has remained above 20,000 for each succeeding year.

¹⁸⁴ See *Dean v. District of Columbia*, 653 A.2d 307 (D.C. 1995).

CHART ONE
 Number of news stories on “same-sex marriage”
 3-year intervals, 1991–2002
 Peak coverage in 1996 at 6601 stories

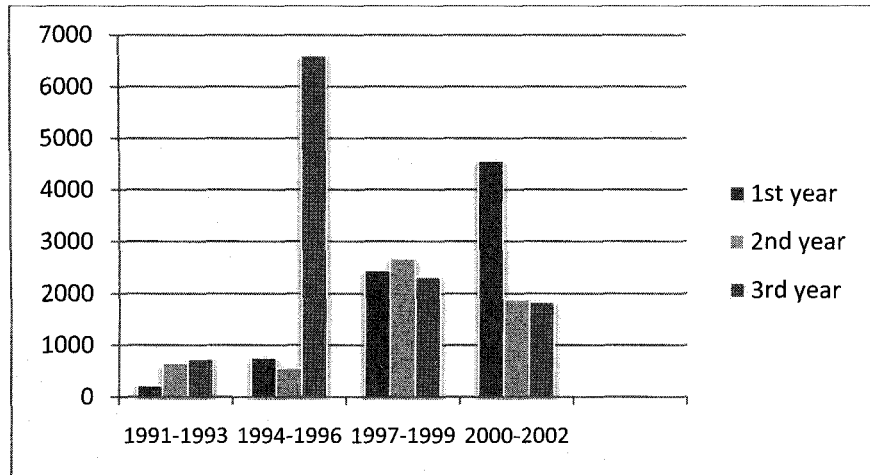
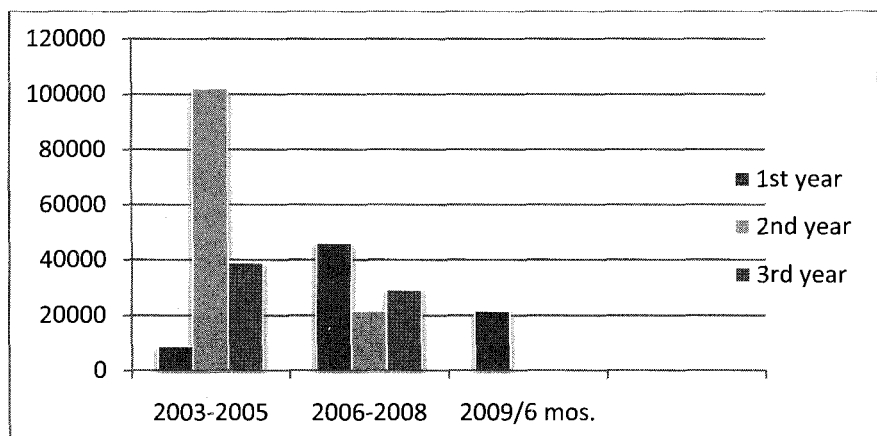


CHART TWO
 Number of news stories on “same-sex marriage”
 3-year intervals, 2003–2009 (through June 30, 2009)
 Peak coverage in 2004 at 102,000 stories



APPENDIX TWO

Cases challenging state marriage laws after the Massachusetts Supreme Court recognized marriage equality ruling:

- Indiana: *Morrison v. Sadler*, 821 N.E.2d 15 (Ind. Ct. App. 2005) (upholding the exclusion of same-sex couples from marriage);
- Arizona: *Standhardt v. Superior Court of the State of Ariz.*, 77 P.3d 451 (Ariz. Ct. App. 2003), *review denied* (2004) (upholding the exclusion of same-sex couples from marriage);
- Oregon: *Li v. State*, 110 P.3d 91 (Or. 2005) (ruling that the enactment of a constitutional amendment while the litigation was pending prevented the court from recognizing marriage rights for same-sex couples);
- Washington: *Andersen v. King County*, 138 P.3d 963 (Wash. 2006) (upholding the exclusion of same-sex couples from marriage);
- New Jersey: *Lewis v. Harris*, 908 A.2d 196 (N.J. 2006) (holding that the exclusion of same-sex couples from marriage violated the equality provisions in the state constitution and referring the remedy question to the legislature, which adopted civil unions instead of marriage);
- New York: *Hernandez v. Robles*, 855 N.E.2d 1 (N.Y. 2006) (upholding the exclusion);
- Maryland: *Conaway v. Deane*, 932 A.2d 571 (Md. 2007) (upholding the exclusion);
- California: *In re Marriage Cases*, 183 P.3d 384 (Cal. 2008) (ruling in favor of same-sex couples and extending them the right to marry);
- Connecticut: *Kerrigan v. Comm’r of Pub. Health*, 957 A.2d 407 (Conn. 2008) (ruling in favor of same-sex couples and extending them the right to marry);
- Iowa: *Varnum v. Brien*, 763 N.W.2d 863 (Iowa 2009) (ruling in favor of same-sex couples and extending them the right to marry).

APPENDIX THREE

States vary greatly on their willingness to recognize relationships between same-sex partners. States generally fall into the following categories: (1) states that recognize full marriage equality; (2) states that have adopted some alternative institution, such as civil unions, that provide spousal equivalency; (3) states that have accorded some spousal rights, but not enough to constitute an alternative to marriage; (4) states that are free to enact marriage legislation because there is no constitutional barrier; (5) states with constitutional amendments banning same-sex marriage, but are otherwise free to enact civil unions; and (6) states with constitutional amendments banning both same-sex marriages and alternative institutions. Some states fall into two categories. The legislatures in Oregon and California have enacted spousal equivalency, but are prevented by a constitutional amendment from enacting marriage.

STATUS RECOGNITION CHART FOR SAME-SEX COUPLES

This chart is current through October 15, 2009

| Category 1: Full marriage equality | Category 2: Spousal equivalency: Registered Domestic Partners (RDP) or Civil Unions (Civ. Union) | Category 3: Some recognition but not spousal equivalency | Category 4: Legislative action in favor of marriage is possible | Category 5: Constitutional amendments prohibiting only marriage equality | Category 6: Constitutional amendments prohibiting any recognition of same- sex couples |
|--|--|---|--|--|---|
| California (June– Nov., 2008)* Connecticut** Iowa Massachusetts N. Hampshire** Vermont** | California (RDP) New Jersey (Civ. Union) Oregon (RDP) Washington (RDP) Nevada (RDP) | Hawaii (Reciprocal Beneficiary) Colorado (Designated Beneficiary) Maine (Domestic Partnership) Maryland (Domestic Partnership) Wisconsin (Domestic Partnership) | Delaware Hawaii Illinois Indiana Maine*** Maryland Minnesota New Jersey New Mexico New York North Carolina Pennsylvania Rhode Island Washington West Virginia Wyoming | Alaska Arizona California Colorado Mississippi Missouri Montana Nevada Oregon Tennessee | Alabama Arkansas Florida Georgia Idaho Kansas Kentucky Louisiana Michigan Nebraska North Dakota Ohio Oklahoma South Carolina South Dakota Texas Utah Virginia Wisconsin |

* Eighteen thousand same-sex couples married in California after the marriage decision was handed down and before the state passed Proposition 8 on November 4, 2008. In *Strauss v. Horton*, the California Supreme Court ruled that the state could not apply Proposition 8 retroactively to void

marriages validly entered into before November 5, 2008.¹⁸⁵

** Both New Hampshire and Vermont recently enacted same-sex marriage laws.¹⁸⁶ Both states also recognize civil unions.¹⁸⁷ In New Hampshire, civil unions will automatically convert to marriages once the new law takes effect.¹⁸⁸ In Vermont, current civil unions will remain valid as civil unions, but no future civil unions will be possible.¹⁸⁹ Connecticut also recognized civil unions before the Connecticut Supreme Court ruled in favor of same-sex marriage.¹⁹⁰ On October 1, 2010, Connecticut civil unions will become marriages by operation of law.¹⁹¹

*** The Maine legislature passed a marriage equality bill in May, but it was vetoed by the people on November 3, 2009. There is nothing to prevent the legislature from passing another bill in the future.

Other Notes:

- (1) The District of Columbia also recognized same-sex marriages from other jurisdictions.¹⁹²
- (2) Wisconsin is the first “category 6” state¹⁹³ to pass legislation providing recognition of same-sex domestic partners and extending a limited number of rights to such partners.¹⁹⁴ That legislation is being challenged as a violation of the constitution in *Appling v.*

185. *Strauss v. Horton*, 207 P.3d 48, 122 (Cal. 2009). The *Strauss* opinion addressed only the validity of the 18,000 marriages performed in California. *See id.* The legislature has clarified, consistent with the reasoning in *Strauss*, that same-sex marriages legally entered into outside of California before November 5 will be valid under California Law. *See* CAL. FAM. CODE § 308 (West 2009).

186. 2009 Vt. Acts & Resolves 3; N.H. REV. STAT. ANN. §59:1 (2009); N.H. REV. STAT. ANN. § 61 (2009).

187. VT. STAT. ANN. tit. 15, § 1201–1208 (2009); N.H. REV. STAT. ANN. § 457-A:1–8 (2009).

188. N.H. REV. STAT. ANN. §457:46 (2009).

189. *See* Office of the Secretary of the State, The Vermont Guide to Civil Unions (July 2008), available at <http://www.sec.state.vt.us/otherprg/civilunions/civilunions.html>; *see generally* 2009 Vt. Acts & Resolves 3.

190. *See* Robert D. McFadden, *Gay Marriage Is Ruled Legal In Connecticut*, N.Y. TIMES, Oct. 11, 2008, at A1; CONN. GEN. STAT. §46b-38aa (2009).

191. 2009 Conn. Pub. Acts 09-13.

192. *See* Tim Craig, Uproar in D.C. as Same-Sex Marriage Gains, WASH. POST, May 6, 2009, at A1.

193. *See* WIS. CONST. art. XIII, § 13 (defining marriage as between one man and one woman and further providing that “[a] legal status identical or substantially similar to that of marriage for unmarried individuals shall not be valid or recognized in this state”).

194. 2009 Wis. Assem. B. 75; *see also* Fairwisconsin.org, Wisconsin Domestic Partnership Protections Reference Guide (2009), http://www.fairwisconsin.org/downloads/DP_Reference_Guide.pdf (stating that the domestic partnership bill became law on June 29, 2009).

Doyle. A copy of the petition can be found at http://www.wisconsinfamilyaction.org/materials/ApplyingvDoyle_Petition.pdf.

(3) Summary of Table Facts:

- Twenty-nine states bar marriage by constitution.
- One state (Hawaii) has a constitutional provision authorizing the legislature to define marriage.
- Twenty states have no constitutional restriction.
- Of those twenty states,
 - Five states have extended marriage rights (Massachusetts, Connecticut, Iowa, Vermont, and New Hampshire).
 - Five states have rejected court challenges (Indiana, New Jersey, New York, Maryland, and Washington).
 - Nine states could still entertain state constitutional law challenges (Delaware, Illinois, Minnesota, New Mexico, North Carolina, Pennsylvania, Rhode Island, West Virginia, and Wyoming). A constitutional challenge would also be possible in Maine, but it is more likely that the legislature will enact a new marriage bill.